Supreme Court, U.S.
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No 98 - 2001

IN THE
SUPREME COURT OF THE UNITED STATES

Marie-Thérèse Assa'ad-Faltas, MD, MPH
[hereinafter "Dr. Faltas"],

Petitioner,

v.

The University of South Carolina
[hereinafter "USC"], *et al.*

Respondents.

and

Marie-Thérèse Assa'ad-Faltas, MD, MPH
[hereinafter "Dr. Faltas"],

Petitioner,

v.

The Attorney General of Virginia
for the Commonwealth of Virginia; *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION
TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Title VII prohibit *quid-pro-quo* discrimination by religion as it does with sex?

2. Does the crime-fraud-*or-tort* exception pierce the attorney-client privilege and render an attorney liable to a non-client if he advises a client to violate Title VII to the non-client's damage?

3. In a Title VII case, is the employer concluded by its own internal review process if such process finds no performance reason for the adverse employment action against the employee?

4. Do this Court's holdings in *Faragher v. Boca Raton* and *Burlington Industries v. Ellerth*, 66 LW 4634 and 4643 (1998), prohibit the employer from taking the employee's demand for safeguards against recurrence of the Title VII violations as a rejection of an offer of reinstatement?

5. If the answer to questions 3 and 4 above is positive, does this Court's holding in *McKennon v. Nashville Banner*, 63 LW 4105, 115 S.Ct. 879 (1995), limit trial, and perforce discovery, in a case as here presented to the issue of damages, deeming liability established as a matter of law?

6. Since education is compelling thought, and educational testing is compelling speech, can states operate universities as their *alter egos* without violating the First Amendment that prohibits government from compelling speech no matter how "correct" or salubrious that speech is?

7. Does the Republican Form of Government, guaranteed to each state under Title IV, Section 4, of the Constitution of the United States, prohibit a state attorney general from *totally* abdicating to a private lawyer the determination of what the state's litigation position should be in civil suits?

8. Do Article III of the Constitution of the United States and this Court's unanimous holdings in *Mathews v. Weber*, 423 U.S. 261 (1976), and *Gomez v. U.S.*, 490 U.S. 858 (1989), require those United States Courts of Appeals that decide to *totally* abdicate the adjudication of certain appeals to their Office of Staff Counsel to first obtain the consent of the parties to the appeal and allow them to object to the Office of the Staff Counsel's proposed dispositions of such appeals?

9. Do mere acts of arguing that the answers to questions 2 and 7 above should be positive and suggesting early settlement negotiations warrant Rule 11 sanctions on a plaintiff or her lawyer?

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Respondents' Brief Adds Reasons to Grant the Writ

I. It Shows such Departure Below as Warrants an Exercise of this Court's Supervisory Power.

A. Supervision of Lower Courts is Integral to This Court's Function.

While this Court cannot realistically review every decision below that shocks the conscience, periodic *sampling* of the lower courts' work could maintain the vigor of this Court's supervisory power—without which all lower courts would be free to ignore this Court's holdings.

This Court's extensive jurisprudence on extra-ordinary writs shows its correct willingness to use its supervisory powers to make lower courts obey its orders in the cases it decided. But this Court does *not* sit for the *sole* benefit of the few parties to the *selected* cases it decides. *It sits for the benefit of the whole nation throughout its history.* What is sought here is *not* an extraordinary writ but a writ of *certiorari* on novel questions of extreme constitutional and practical importance.

But even if the sole issue were the lower courts' departures from this Court's entire jurisprudence on recusal, on Title VII, on discovery, and/or on limits to delegation of Article III powers, *certiorari* would still be justified under this Court's own Rule 10(a), which provides:

> The following . . . indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has . . . so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

The departing courts' *rationale* matters not. "'[T]his Court,' however, 'reviews judgments, not opinions.' *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)." *Texas v. Hopwood*, 116 S.Ct. 2581 (1996) (Opinion of Justice Ginsburg, with whom Justice Souter Joins, respecting denial of petition for a writ of certiorari).

Questions 1-7 and 9, presented in the Petition for a Writ of Certiorari [hereinafter PETITION] are properly raised in Petitioner's complaints, motions and arguments, before the U.S. District Court (D.S.C.) and fully preserved in her briefs to the U.S. Court of Appeal (4th Cir.).

The Court of Appeals' failure to *opine* on them cannot foreclose this Court's review; rather, it created Question 8. The Brief in Opposition [hereinafter OPPOSITION] unwittingly shows how far the lower courts departed from the accepted and usual course to indulge Respondents

Here, the *judgments* below dismissed a doctor's two meritorious civil rights cases *explicitly* because she "used paper clips" to gather some of the 1881 pages she produced to Respondents on 21 March 1996 (OPPOSITION at 20)[1], because "both her sisters are physicians,[2]" because she is bright,[3] because "her demeanor" in her 5-day deposition in the first case did not charm the magistrate judge who attended it *or Respondents* (A3), and because a special master was indifferent to her *physical* inability to continue beyond 5:15 pm on the the fifth day of her deposition in the second case (A5). Those judgments also used Rule 11 to sanction her *for having opposed motions to dismiss her claims.*[4]

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[1] Only the guillotine as a penalty for a pin prick can be more draconian than that.

[2] The 11 July 1996 ORDER ON PLAINTIFF'S MOTION FOR RECONSIDERATION at n3 (OPPOSITION Appendix [hereinafter Opp.App. at 7-8) reads:

> [Dr. Faltas' Title VII case must be dismissed *because*, while she] *had no other treating physician other [sic] than herself* and had placed her medical condition at issue[, and while] parts of the record are susceptible to a reading that she consulted only one sister, *the record also reveals that both [her] sisters are physicians* and the record is certainly not so clear as to rule out consultation with both. *See Generally* Order of Dismissal at 11 and at Appendix A. [emphasis added]

[3] With emphasis added, OPPOSITION at 25 reads:

> As noted in Judge Anderson's July 19, 1996 Order at page 6, the petitioner's "*considerable intelligence and demonstrated legal ability*" compel the conclusion that her "*behavior was . . . . a matter of bad faith.*"

[4] With emphasis added, the 16 August 1996 SUBSTITUTED ORDER DENYING PLAINTIFF'S MOTION TO ALTER OR AMEND (Opp.App. at 25-26) reads:

> although plaintiff was represented at the time the complaint was filed, she was not represented when *she later continued to vigorously advance the claims in the complaint* both in oral arguments and *in written opposition to the defendants' dispositive motions.*

B. The Departure Began with Disregard of 28 U.S.C. §455(b) and of *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988).

Any division in *Liljeberg* was on scienter *only*. All Justices agreed that Judge Collins (trier of *Liljeberg*) should have recused himself as soon as he knew of Loyola's interest. Judge Anderson's 11 October 1995 ORDER shows his grasp of the implications of Dr. Faltas' challenge to the constitutionality of S.C. Insurance Reserve Fund [hereinafter SIRF]. He also knew that his brother is on SIRF's payroll. Had a court invalidated SIRF (Question 7 and PETITION at 11), his brother would have lost his SIRF income which is covered by 28 U.S.C. §455(d)(4).[5]

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5 This chart samples how he punished her, with his disparate treatment of people in equal situations, for *unwittingly* jeopardizing his brother's income:

Dr. Faltas' Relatives	Respondents' Relatives
He dismissed Dr. Faltas' Title VII case because she testified that she did not know the address of her baby sister who was still a medical student at the time of the complaint but had graduated before the deposition.	He imposed Rule 11 sanctions on Dr. Faltas for having sued Eslinger's husband despite testimony that the latter had bought her law practice and his ruling that a claim against Eslinger was not lacking in foundation.
In objecting to the magistrate judge's RECOMMENDATION to dismiss her Title VII case, Dr. Faltas showed that there was no legitimate use to Respondents from the address of her baby sister. But Judge Anderson took it as bad faith. n 2 SUPRA	When Dr. Faltas argued that Respondent Creswick's ownership of Eslinger's law practice made him a respondent superior, Judge Anderson ruled that Dr. Faltas was arguing in bad faith that every husband is his wife's employer. Opp.App. at 28-29
During the deposition in the second case, Eslinger insisted on finding Dr. Faltas' sisters, WHO HAVE NOTHING TO DO WITH EITHER CASE; but the judge lifted the 5-day limit on the deposition instead of sanctioning Eslinger by terminating it. OPPOSITION at 21	When Eslinger eluded service of the complaint by certified mail, Dr. Faltas telephoned to confirm her address; the judge reacted with a BROAD UNCONSTITUTIONAL injunction against Dr. Faltas without evidence that she did anything wrong. OPPOSITION at 12.

Judge Anderson recused himself in October 1996 from all matters involving Dr. Faltas—*after* he had dismissed her cases and imposed Rule 11 sanctions on her, *infra*, for her claim against SIRF managers *inter alia*. He always attributed her shock at his rulings to some unidentified evil on her part, not to his bias which §455(b) anticipates.

C. Manifest Abuse of Rule 11 Powers Resulted.

Judge Anderson's 16 August 1996 ORDER (Opp.App. at 29) insists:

> Plaintiff also argues that the court had a duty to dismiss her claims under 28 U.S.C. §1915(d), if at all, and that because the claims were not dismissed prior to service, the court is precluded from imposing Rule 11 sanctions. Such an interpretation would turn a tool available to courts to protect defendants from frivolous claims into a shield to protect the filers of frivolous claims[,...] deny the court the advantage of briefing by the parties when that would be helpful and delay the service of most *in forma pauperis* complaints. *Not only is this court confident that none of these results was intended by Section 1915(d), but it is confident that plaintiff knows it.* [emphasis added]

What Dr. Faltas "knows" is the very opposite of "it": Since *Boyce v. Alizaduh*, 595 F.2d 948, 950 (4th Cir. 1976), *the Fourth Circuit* follows Judge Aldisert's committee's recommendation that:

> the decision whether to dismiss pursuant to §1915(d) be made *prior to the issuance of process. In this way the defendant will be spared the expense and inconvenience of answering a frivolous complaint.* The committee recommends dismissal with no opportunity to respond when the complaint is irreparably frivolous or malicious. . . . *If there are multiple defendants, the complaint should be dismissed as to those defendants against whom a frivolous or malicious cause of action is alleged and should be allowed to continue against the other defendants.* [emphasis added]

And *Neitzke v. Williams*, 490 U.S. 319, 320 (1989), was unanimous:

> The question presented is whether a complaint filed in *forma pauperis* which fails to state a claim under Federal Rule of Civil Procedure 12(b)(6) is automatically frivolous within the meaning of 28 U.S.C. § 1915(d). The answer, we hold, is no.

Nothing having ever appeared to the contrary, "frivolous" must have the same meaning in Rule 11 and in §1915. To fulfil its goal of protecting defendants from sanctions-proof plaintiffs' malice or frivolity, §1915 requires no less, *but allows no more*,[6] than rigorous screening *before issuance of process*, which compels at least a presumption that claims that passed the judge-administered §1915 test *cannot later fail the same test administered by the same judge* only under a Rule 11 rubric.[7] If the judge omitted his §1915 duties, he compounded his error by shifting to Dr. Faltas costs that would *not* have been incurred had he denied service on those defendants who later filed extensive Rule 12 motions then moved for Rule 11 sanctions to recover their costs.[8]

Having given *all claims* in Dr. Faltas' second complaint the §1915 *not-frivolous-or-malicious* stamp of approval, and being legally barred from finding a claim that fails the Rule 12(b)(6) test automatically frivolous, Judge Anderson seized on Attorney Briggs' letter inviting settlement talks to find "improper purpose" in her innovative claims.

His punitive zeal is evident from his haste to award Rule 11 sanctions to those named *solely* as jointly liable with Eslinger even after he was constrained to find (based on the 28 October 1993 letters, n 8 *supra*) that Dr. Faltas' claim for tortious interference with contract against Eslinger was not "lacking in factual foundation" or sanctionable.

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6 Dr. Faltas never deemed post-filing conduct outside courts' regulatory power. But imposing Rule 11 sanctions on a *pro se* plaintiff for *opposing dismissal* of claims that are neither frivolous nor malicious (as evidenced by their having passed the §1915 test) would have been funny had it not been cruel.

7 Even then, only enough to deter further claims may be imposed; *i.e.*, the sanction must be proportionate to the plaintiff's, not the defendant's, wallet.

8 Please do NOT fail to see the full text of Eslinger's 28 October 1993 letters (at Petitioner's Appendix A26-31). *These letters were submitted to Judge Anderson* for *in camera* review before he granted Rule 11 sanctions *or* dismissed either case (11 July 1996 ORDER ON PLAINTIFF'S MOTION FOR RECONSIDERATION at n4 [A7-8 and Opp.App. at 10]). He withheld them from Petitioner and denied *her* discovery on them. But they prove that said defendants had knowingly embarked on expensive legal adventurism at state expense.

II. Sanity Needs to be Restored to Discovery.

A. This Court often examines the fairness of sanctions.

This Court requires discovery sanctions to be "just." *Hovey v. Elliot*, 167 U.S. 409 (1897), reversed dismissal as punishment for contempt. *Societé internationale pour participation industrielles et commerciales v. Rogers*, 357 U.S. 197 (1958), credited a fear of violating Swiss laws. *Degen v. U.S.*, 116 S.Ct. 1777 (1996), allowed a fugitive to participate in discovery *on his own terms*. And *Whirlpool v. Marshall*, 445 U.S. 1 (1980), upheld all civilians' right to disobey orders reasonably *perceived* to threaten life or health. Dr. Faltas is neither a contemnor nor a fugitive; she is *a physician* whose "several physical ailments" were already on record, who treated herself (n 2, *supra*), and whose best *medical* judgment compelled her to leave her deposition at 5:15 pm, *offering to resume it under medically necessary arrangements.* "*Questions of medical judgments are not subject to judicial review.*" *Boyce, supra*, at 953, n9.

B. The lower courts and the defense bar created a "discovery for its own sake" culture which culminated in travesty in this case.

Hickman v. Taylor, 329 U.S. 495, 516 (1946), prophetically taught: "*Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversaries.*"

The Federal Rules of Civil Procedure match *Hickman* in protecting every party from being forced to engage in interpretive exercises for the benefit of another. FRrCP 33(d) and 34(b) provide, respectively [with emphasis and reemphasis added]:

> Where the answer to an interrogatory may be derived ... from the ... records of the party upon whom the interrogatory has been served *or from* ... a compilation ... or summary, thereof and the burden of deriving ... the answer is substantially the same for the party serving the interrogatory as for the party served, *it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained* and to afford the party serving the interrogatory reasonable opportunity to examine ... such records *and to make copies*, ...
>
> A party who produces documents for inspection shall produce them *as they are kept in the usual course of business or* .....

And FRCP 26(b)(2)(i) expects courts to take "into account the parties' resources" and to consider "whether the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive." Moreover, FRCP 26(b)(2) mandates "taking into account the needs of the case;" and FRCP 26(c)(3) empowers courts to order "that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery." Clearly, it is *the one making, not seeking,* discovery who chooses the details of compliance.

But Judge Anderson failed to keep the nature and needs of the cases in sight. He never determined what prejudice (if any) befell Respondents from anything Dr. Faltas was unable to give them *(because it did not exist, because defendants alone had it, or because she did not otherwise have it).* Instead, he kept ruling that she must be invaded, but they protected, *because* it is she, not they, who sued; *e.g.*, Opp.App. at 18.

And the usual financial incentives to keep discovery in line with the case were lifted or reversed here. The state covers all legal costs, not through an attorney general answerable to the electorate, but through private lawyers paid by the hour and immune to all political and market forces (Question 7, PETITION at 11) The result is outrage; *e.g.*:

(1) In October 1994, they wanted her to take her documents to their office *and leave them there;* (2) Circa 5:00 pm on 21 May 1996, Dr. Faltas testified that Defendants had defamed her to "the readers of *The Charleston Post and Courier.*" Eslinger followed up *twice:* "Name them!"

Ten days[9] of that could not have been "achieved" without deposing counsel's loading the questions with repetitions and irrelevancies.[10]

9 The first deposition started open-ended but, on the third day, the district court limited it to five days. The reverse happened with the second deposition; but a shocking 15 May 1996 ORDER had barred her from using at trial any evidence she gives during her deposition if she had not *previously* given it in writing.

10 Contrary to OPPOSITION at 11 and 22, common sense, not review of 35 videotapes, is needed to know that and to know that it irritated Dr. Faltas. Had her irritation crossed a mark, the correct penalty would have been for the judicial or quasi-judicial officer present to cite her for contempt of court, not dismissal.

Common sense also sees in the dates sprinkled throughout OPPOSITION a pattern of inactivity from January to May 1995, followed by a very busy June 1995. The reason is not delay by Dr. Faltas but judicial freeze on discovery pending resolution of the Rule 12 motions.[11] Having, *well before trial*,[12] obtained *all* her *responsive*[13] documents and tapes,[14] Respondents complain along two *mutually exclusive* themes:

(1) They could not "understand" the probative value of her documents because she produced them in the chronological order *in which she kept them*, not in the order of Respondents' oppressively numerous, overbroad, repetitive and *hopelessly overlapping*, interrogatories and requests for production (OPPOSITION at 19-20).[15] They invent "her bad faith" to blame for that in lieu of their "no wits."

(2) After seeking *and receiving* her documents "which support [her] claims," they were unable to use them "to prepare a defense." They ascribe *that* to "abuse of discovery," not to the strength of her case.

Per this illogic of dismissal *for failure to create a defense*, the stronger a case, the likelier it is to be dismissed; and defense counsel may *veto* any case from going to trial by simply playing dumb in discovery. Nor is dismissal a, much less *the only*, deterrent as *per* OPPOSITION at 27, 29.

11 That period should not count against her. And a May 1995 ORDER protecting her from any discovery on RICO (after dismissal of the RICO claims and of several defendants in April 1995) reduced the number of her responsive documents *exponentially* to "only 713 pages." OPPOSITION at 7. No law entitles a defendant to a magic number of pages from a plaintiff below which dismissal is mandated. They never showed that she withheld anything responsive.

12 After discovery was unfrozen, Dr. Faltas obtained a few brief extensions.

13 They never sought documents "helpful to defendants" (none exists anyway), only the documents, facts, and witnesses that "support [some of her] claims."

14 Specious is their feigned fixation on "corroborating witnesses." Defendants' own authentic writings and recorded speech are *per se* evidence of their acts and motives. Corroboration, if available, would have been only cumulative.

15 That would have required her to make 50 copies of most of her 15 tapes and 2,500 pages to create separate sets responsive to each numbered question.

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Dismissal of "the USC case" deterred *nothing* in "the Attorney General case" which was also dismissed as a discovery sanction. When asked for the impossible,[16] Dr. Faltas will always fail to comply no matter how many times she was sanctioned for such failure before.

C. Title VII Cases Need a Discovery Scheme Parallel to the Shifting Burdens Scheme of Proof, particularly after *McKennon v. Nashville Banner*, 115 S.Ct. 879 (1995):

> Where an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge. *The concern that employers might as a routine matter undertake extensive discovery into an employee's background or performance on the job to resist claims under the Act is not an insubstantial one*, but we think the authority of the courts to award attorney's fees ... and ... to invoke the provisions of Rule 11 of the Federal Rules of Civil Procedure will deter most abuses. [emphasis added]

Thus ends *McKennon* but begin new questions: (1) After how much discovery[17] must the employer concede that no reason of *McKennon* severity exists? (2) What if the employer obtains in discovery a lesser reason but tries to pass it off at trial as *the true pre-decision* reason?

This Court and Congress having limited the defenses admissible in Title VII cases to unmixed pre-decision motives, and proper discovery being what leads to admissible evidence, a decision tailoring discovery accordingly is a natural, much needed sequel to *McKennon*.

This case offers an opportunity for such decision, for it shows the travesty of untailored discovery. Petitioner was branded "abusive" for arguing below that Respondents should have a had "a defense" before the adverse action, not expect to discover one from her in litigation.

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16 Finding "a defense" for Respondents where none exists entails the *moral* impossibility of agreeing under affirmation that their *false* pretexts are true and the *intellectual* impossibility of naming everyone who read a newspaper.

17 A never-ending discovery may be motivated by undying hope, not bad faith.

Respondents had *not* gone to court cold. The final decision to fire Dr. Faltas was made *in November 1993* by USC *after its receipt of* the 28 October 1993 letters from Eslinger, *who was not then USC's counsel.*

The letters urged USC to fire Dr. Faltas and offered defenses (each a *per se* Title VII violation): (1) use "immigration" against her; (2) treat her request for prevention of recurrence of the offending conduct as rejection of reinstatement; (3) "insist" on firing her because she had Title VII claims against prior employers; and (4) undermine USC's own appeal committee's finding that the factual pretexts given for dismissing her are false. (PETITION at 5 and A26 - A31, and n 8, *supra*)

Dr. Faltas' two complaints are very detailed (49 pages each) and survived ten Rule 12 motions. At proper points, she moved the district court to decide if, *as a matter of law*, USC was concluded by its own appeal committee's factual findings, requiring judgment to be entered in her favor as to liability. "Discovery first" was the response.

Against Dr. Faltas' legally and factually unassailable cases, Respondents (who had nothing *admissible* to discover), stopped at nothing.[18]

Their contrivances were indulged by a judge who recused himself one year and two dismissals too late. He was affirmed by a Court of Appeals where "*decisions are handed down with only the tangential involvement of Article III judges.*" PETITION at 11, quoting their *Nasim*.

CONCLUSION

Because the lower courts' indulgence of Respondents warrants an exercise of this Court's supervisory power, and because this case presents novel important questions, the petition for a writ of *certiorari* should be granted.

Respectfully submitted by
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18 Ordering Dr. Faltas, known to have partial vocal cord paralysis (OPPOSITION at 23), to testify beyond 5:15 pm on a day that started at 9:00 am—all after she testified thrice to being "very tired"—is nothing short of physical torture.